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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-496

CLARENCE WARD,
Petitioner,

vs.

VILLAGE OF MONROEVILLE, OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Constitution.

Statutes.

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CLARENCE WARD,

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VILLAGE OF MONROEVILLE, OHIO,

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-captioned case on July 14, 1971.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals of Huron County, Ohio affirming petitioner's convictions is reported as *Monroeville v. Ward,* 21 Ohio App. 2d 17, 254 N.E.2d 375 (1969) and is printed in the Appendix attached hereto, *infra,* p. 34.

The opinion of the Supreme Court of Ohio affirming the judgments of the Court of Appeals is reported as *Monroeville v. Ward,* 27 Ohio St. 2d 179, 271 N.E.2d 757 (1971) and is printed in the Appendix attached hereto, *infra,* p. 15.

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Ohio which petitioner seeks to have this Court review was entered on July 14, 1971. Jurisdiction to review this judgment by writ of certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3). Petitioner claimed in each of the courts below that he was compelled to stand trial before a village mayor who could not be the fair and disinterested judicial officer to which he was entitled under the due process clause of the Fourteenth Amendment to the United States Constitution.

QUESTION PRESENTED.

Whether a defendant is denied due process of law in violation of the Fourteenth Amendment to the United States Constitution when he is compelled to stand trial before a mayor whose executive responsibilities for revenue production and law enforcement prevent him from acting as a disinterested and impartial judicial officer.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

UNITED STATES CONSTITUTION.

Amendment XIV, Section 1:

* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; * * *

OHIO REVISED CODE.

Sections 733.23, 733.24, 733.30, 733.32, 733.33, 733.40, 737.15, 737.18, 1905.01, and 1905.20 are set forth in the Appendix, *infra*, p. 46.

STATEMENT OF THE CASE.

This Petition seeks to have this Court review a judgment of the Supreme Court of Ohio entered July 14, 1971 affirming petitioner Clarence Ward's conviction of two offenses by the Village of Monroeville Mayor's Court.

In the first case, Ward was charged with violating Ordinance No. 47-12, Section 2 of the Ordinances of the Village of Monroeville in that he was alleged to have failed to comply with a lawful order of a police officer (Tr. 4),[1] to-wit: failure to stop his truck at a P.U.C.O. checkpoint upon the wave of Officer Leonard Conners of the Monroeville Police force (Tr. 12).[2]

Before entering a plea, counsel for Ward renewed a motion, originally made at a previous hearing on the same cause, to dismiss the prosecution, or, in the alternative, certify it to a proper court on the ground that the Mayor could not sit as the disinterested and impartial tribunal to which the defendant was entitled under the Fourteenth Amendment's guarantee of due process of law. The Mayor rejected the contention and overruled the motion (Tr. 5).

Immediately upon entering a plea of not guilty to the charge (Tr. 8) Ward was asked by the Mayor:

> "Did you wish to offer in the way of testimony anything at this time?" (Tr. 8).

In response to counsel's objection to this order of proceeding, the prosecution, represented by the Village Solicitor, put on its case by presenting the testimony of Leonard Conners, the Village Chief of Police (Tr. 9). On direct examination Conners testified to Ward's failure to

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[1] "Tr." cites to the page in the trial transcript, known in Ohio as the Bill of Exceptions.

[2] By the time of trial, Officer Conners had become the Village Chief of Police (Tr. 9).

stop his truck at the point where Conners waved at him (Tr. 12), and to a subsequent altercation, at the Farm Restaurant (the point where Ward did stop), between Ward and himself, involving the use of tear gas by Conners (Tr. 17) and his unsuccessful efforts to handcuff the defendant (Tr. 18).

When counsel for the defendant attempted to explore this subsequent altercation on cross-examination for its bearing on the bias and credibility of the witness, he was met by the following objection:

> "The Mayor: This charge we are interested in this one. [sic] As an outgrowth of an event that happened prior to the Farm Restaurant. This Court isn't interested in anything that happened at the Farm Restaurant. We are interested in failure and refuse [sic] to comply with a lawful order of a police officer, Ordinance 47-12, Section 2 of the Village of Monroeville, and this is a Village Ordinance, and that is all I am interested. What this man did or did not do beyond that point, I could care less. I sit here as an impartial judge, and I care not what this man does. The only thing I want to see is that this case is brought to a conclusion, and we can dispense with the stalling and haggling. This is what I want to do, and that is all I want to do. This man isn't going to make me one cent richer or one cent poorer. He is an unentity as far as I am concerned.
>
> Mr. Schwartz: Nevertheless, the ensuing events do relate to this witness's credibility, and that is my only purpose.
>
> The Mayor: Are you going to sit here and are you going to challenge the credibility of the police officer that gives testimony under oath?
>
> Mr. Schwartz: Yes.
>
> The Mayor: You are going to challenge the credibility of this police officer?
>
> Mr. Schwartz: Yes.
>
> The Mayor: Under oath?

Mr. Schwartz: Yes.

The Mayor: This man? Very well, you may proceed." (Tr. 36-38).

Further questioning of Conners and statements made by the Mayor revealed that Conners had been appointed Chief of Police by the Mayor and that the Mayor had the power to remove him from office (Tr. 45).

Conners testified that he did not know whether there was a comparable Ohio Revised Code section under which he could have charged the defendant, but that it was his practice always to charge under the village ordinances where a choice existed (Tr. 25). However, Conners manifested great reticence when asked upon whose instructions this practice was based.

"Conners: Do I have to answer that one?

The Mayor: You are the man that is being questioned. You handle it as you see fit." (Tr. 26-27).

Although Conners never answered the question, the Mayor revealed that it was he who had so instructed Conners (Tr. 28).

After Conners' testimony, the prosecution rested and the defendant offered no witnesses. The Mayor found a verdict of guilty as charged (Tr. 54), rejecting the defendant's contention that as a result of the speed of the truck (Tr. 30), the fact that it was loaded (Tr. 30), the distance from which Conners waved (Tr. 30), and the fact that other trucks were lined up on the berm (Tr. 21), the defendant could not reasonably have stopped at the time and place commanded by Conners (Tr. 51).

The Mayor imposed the maximum fine of $50.00 and costs (Tr. 54).

In the second case, Ward was charged with "Failed and refused to produce drivers license on request of a police officer" arising out of the same occurrence that

generated the first charge. Defendant's counsel filed an affidavit to disqualify the Mayor (for the same constitutional reasons advanced in the Motion to Dismiss in the first case) in the Common Pleas Court.

In addition to the facts alleged in the affidavit, the evidence adduced at the hearing on the affidavit revealed that a substantial portion of the Village of Monroeville's general fund was derived from fines levied by the Mayor's Court as follows:

Year	Fine Revenue	Total General Fund Revenue
1964	$23,589.50	$46,355.38
1965	$18,508.95	$46,752.60
1966	$16,085.00	$43,585.13
1967	$20,060.65	$53,931.43
1968	$23,429.42	$52,995.95 (Tr. II-5).[3]

Further the evidence showed that the Village regarded the maintenance of its fine revenue as essential to avoiding increased taxes and/or curtailed municipal services, so that it had enacted Ordinance No. 59-9 to hire a management consultant firm to study the threat to its fine revenue posed by the 1959 County Court law reducing the jurisdiction of the Mayor's Courts (Tr. II-7).[4]

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[3] Tr. II cites to the page in the Bill of Exceptions in the second case.

[4] The Ordinance provided in pertinent part,

"WHEREAS, the legislation known as the County Court law passed by the 102nd General Assembly greatly reduces the jurisdictional powers of Mayor Courts as of January 1, 1960; and

"WHEREAS, such restrictions may place such a hardship upon law enforcement personnel in this village and surrounding areas as to endanger the health, welfare and safety of persons residing or being in our village; and

"WHEREAS, other such provisions of this legislation may cause such a reduction in revenue to this village that an

(Continued on following page)

Defendant's affidavit of disqualification was overruled and the case remanded to the Mayor's Court for trial (Tr. II-17), where Ward was again convicted and fined the statutory maximum of fifty dollars and costs (Tr. II-b).

Defendant appealed both convictions to the Huron County Common Pleas Court asserting as the sole assignment of error that he had been deprived of his right to be tried by a disinterested magistrate in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Common Pleas Court passed upon this federal question by affirming the convictions as free of error.

Both cases were appealed to the Huron County Court of Appeals (where they were consolidated upon the motion of both parties), upon the same assignment of error as was asserted in the Common Pleas Court. The Court of Appeals affirmed the convictions with an opinion expressly rejecting defendant's claim that he had been denied a fair tribunal. *Monroeville v. Ward,* 21 Ohio App. 2d 17, 254 N.E.2d 375 (1969) (Appendix, *infra,* p. ___).

An appeal to the Supreme Court of Ohio again resulted in affirmance of the convictions, on July 14, 1971,

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(*Continued from preceding page*)

additional burden may result from increased taxation and/or curtailment of services essential to the health, welfare and safety of this village; . . .

* * * * *

"BE IT ORDAINED BY THE VILLAGE OF [MONROEVILLE] OHIO:

Section 1: That the services of the management consulting firm of Midwest Consultants, Incorporated of Sandusky, Ohio, be employed to conduct a survey and study to ascertain the extent of the effects of the County Court Law on law enforcement and loss of revenue in and to the Village of [Monroeville], Ohio, so that said Village can prepare for the future operations of the Village to safeguard the heath [sic], welfare and safety of its citizens. * * *"

and a majority opinion expressly rejecting defendant's federal contention. *Monroeville v. Ward*, 27 Ohio St. 2d 179, 271 N.E.2d 757 (1971) (Appendix, *infra*, p. 15). Two justices dissented on the ground that the mayor's executive responsibilities for revenue production and law enforcement did prevent him from acting as the impartial judge to which the defendant was entitled as a matter of due process of law. *Id.*, at 27 Ohio St. 2d 189, 271 N.E.2d 762 (Appendix, *infra*, p. 26).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION OF THE OHIO SUPREME COURT BELOW IS IN CONFLICT WITH ONE BRANCH OF THIS COURT'S HOLDING IN TUMEY v. OHIO, 273 U.S. 510 (1927).

In the landmark case of *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court held an Ohio mayor to be disqualified as a disinterested judicial officer not only for the oft-cited reason that the mayor's personal fees were directly dependent on conviction, but also for the too-little-remembered reason that the mayor had a conflicting interest in the financial condition of his village. In the words of Chief Justice William Howard Taft, speaking for a unanimous court:

> "The statute . . . offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. . . . The mayor represents the village and cannot escape his representative capacity. On the other hand, he is given the judicial duty, first, of determining whether the defendant is guilty at all, and second, having found his guilt, to measure his

> punishment. . . . With his interest, as mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?" *Id.*, at 533.

The majority below sought to distinguish *Tumey* by pointing out that the mayor's salary is not dependent on fees or fines collected by the mayor's court, citing *Dugan v. Ohio*, 277 U.S. 61 (1928). However, in *Dugan* this Court held a mayor on fixed salary not to be disqualified, because under the applicable commission form of government, the commission and city manager, and not the mayor, wielded the executive power.

Here, the mayor's executive and financial responsibilities are revealed by pertinent sections of the Ohio Municipal Code.[5] It is a fact of political life that executive officials charged with fiscal responsibilities may ingratiate

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[5] See, e.g. Section 733.23, Revised Code:

"The executive power of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law."

Section 733.32, Revised Code:

"The mayor shall communicate to the legislative authority from time to time a statement of the finances of the municipal corporation, and such other information relating thereto and to the general condition of the affairs of such municipal corporation as he deems proper or as is required by the legislative authority."

Section 733.33, Revised Code:

"If, in the opinion of the mayor, an expenditure, authorized by the legislative authority, exceeds the revenues of the municipal corporation for the current year, he shall protest against such expenditure, and enter such protest, and the reason therefor, on the journal of the legislative authority."

themselves with the electorate by providing maximum municipal services at minimum levels of taxation.

The significance of the fine revenue to this Village (and to its officers) is revealed by the statistics showing that fine revenue has accounted for over one-third to one-half of the general fund over the last five years (*supra*, p. 6) and by the alarm with which it viewed a legislative reduction of mayor's court jurisdiction, as manifested by Ordinance No. 59-9 (*supra*, p. 6).

It is difficult to believe that the police chief's practice, at the behest of the mayor, of charging defendants under village ordinances rather than under state law (Tr. 24-28) bears no relationship to Ohio Revised Code Section 733.40 which provides that "all fines, and forfeitures collected by the mayor in state cases . . . shall be paid by him to the county treasury," while such fines and forfeitures in ordinance cases are to be paid into the municipal treasury.

II. THE DECISION OF THE OHIO SUPREME COURT BELOW IS IN CONFLICT WITH THE SPIRIT OF THIS COURT'S DECISION IN TUMEY v. OHIO, 273 U.S. 510 (1927).

In addition to the conflict of fiscal responsibilities condemned by this Court in *Tumey*, the mayor's executive responsibilities for law enforcement represent another disqualifying conflict. This Court has made it clear that due process requires a strict dichotomy between the judicial and law enforcement functions. *Coolidge v. New Hampshire*, ___U.S.___, 91 S. Ct. 2022 (1971). Thus, the cause for a search, for example, must be judged

> ". . . by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1947).

A fortiori is this true where the issue to be determined is the ultimate guilt or innocence of the defendant. Yet

the Ohio Municipal Code prevents the mayor from being a "neutral and detached magistrate" by intimately involving him in the "often competitive enterprise of ferreting out crime." Section 733.24, Revised Code, provides that the mayor of a village

> ". . . shall be the chief conservator of the peace therein."

Section 733.30 imposes upon him the duty of seeing

> ". . . that all ordinances, by-laws, and resolutions of the legislative authority are faithfully obeyed and enforced."

Section 1905.20 confers upon the mayor

> ". . . all the powers conferred upon sheriffs to suppress disorder and keep the peace."

Furthermore, in a case such as this one, involving the testimony of a police witness, the mayor cannot be a "neutral and detached magistrate" in passing upon the credibility and performance of his own appointees (Tr. 45)[6] with whose direction and control he is charged.[7] This problem was startlingly manifested in the instant case, when the mayor revealed his astonishment and incredulity at the prospect that counsel for the defendant would challenge the credibility of his chief of police:

> "The Mayor: Are you going to sit here and are you going to challenge the credibility of the police officer that gives testimony under oath?
>
> Counsel: Yes.
>
> The Mayor: You are going to challenge the credibility of this police officer?

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[6] "Each village shall have a marshal, designated chief of police, appointed by the mayor. . . ." Revised Code Section 737.15.

[7] "The marshall [sic] shall be the peace officer of a village and the executive head, *under the mayor*, of the police force." Revised Code Section 737.18 (Emphasis added).

Counsel: Yes.
The Mayor: Under oath?
Counsel: Yes.
The Mayor: This man? Very well, you may proceed." (Tr. 37-38).

Such manifestations of the mayor's dual roles pervaded defendant's trial and gave eloquent testimony to the wisdom of Chief Justice Taft's declaration that,

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey v. Ohio,* 273 U.S. 510, 534 (1927).

III. WHETHER THE MAYOR OF MONROEVILLE WAS THE FAIR TRIBUNAL REQUIRED BY THE DUE PROCESS CLAUSE IS AN IMPORTANT CONSTITUTIONAL ISSUE OF NATIONWIDE SIGNIFICANCE.

Some insight into the operative burden of proof in the Monroeville Mayor's Court can be gleaned from the fact that immediately following the entry of the defendant's plea of not guilty, the mayor inquired of him:

> "Did you wish to offer in the way of testimony anything at this time?" (Tr. 8).

Petitioner does not intend that this and other cited examples of prosecution bias be construed as an attack upon the personal integrity of Mayor Salisbury of Monroeville. Rather petitioner questions the constitutionality of the system of mayor's courts which puts men like Mayor Salisbury in the impossible position of trying to serve two conflicting masters, to the detriment of the defendant's right to a fair trial.

The significance of the issue posed herein is not limited to Ohio, as at least sixteen additional states still invest their mayors or municipal executives with jurisdiction to try, convict and sentence defendants accused of violating municipal ordinances.[8]

This Court has recognized that the establishment and maintenance of respect for law requires that our legal institutions must not only render justice, but must also "satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955). That there is substantial question about the capacity of a mayor's court to fulfill either requirement is demonstrated by the dissenting opinions written below. Justice Corrigan (writing for himself and Justice Schneider) stressed the relevance of the issue to effective law enforcement, observing:

> "It is with profound mindfulness of the unrest with laws and the enforcement of laws in our country today that I reemphasize the importance of public confidence in the impartiality of all courts. It seems to this member of the court that this confidence, which we strive to merit in the judiciary, may be easily eroded with a mayor's court of this type. This observation is not to be considered in any way as a reflection on the integrity or capacity of the mayor

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[8] Alabama: Ala. Code, Tit. 37, §§ 585, 600 (1958); Arkansas: Ark. Stat. Ann. §§ 19-1102, 1204 (1947); Delaware: Del. Code Ann., Tit. 11, § 4503 (1953), see *Poynter v. Walling*, 177 A.2d 641 (Super. Ct. 1962); Florida: Fla. Stat. Ann. § 168.02 (1966); Georgia: Ga. Code Ann., Ch. 69-7 (1967); Iowa: Iowa Code Ann. § 367.5 (1971 Supp.); Louisiana: La. Rev. Stat., Tit. 33, § 441 (1950); Mississippi: Miss. Code Ann. § 3374-103 (1970 Supp.); Missouri: Vernon's Ann. Mo. Stat. § 98.500-510 (1971); Nebraska: Neb. Rev. Stat. § 29-103, 601 (1964); Pennsylvania: Pa. Stat. Ann., Tit. 53, §§ 22182, 36207 (1957), § 46028 (1966); South Carolina: S. C. Code Ann. § 47-233 (1962); Tennessee: Tenn. Code Ann. § 6-132 (1970 Supp.); Texas: Vernon's Tex. Stat. Ann., Art. 1146 (1963), Tex. Code Crim. Proc., Art. 2.09 (1966); Virginia: Va. Code Ann. § 16.1-70 (1960); West Virginia: W. Va. Code Ann. § 8-10-1 (1969).

who presided as judicial officer at this trial. But I am fearful that a defendant brought into a mayor's court may, with reason and persuasion, rightly complain that he was not likely to get a fair trial or a fair sentence from a judge who, as chief executive, is responsible for the financial condition of the village and who has the chief of police and other police officers under his supervision; who passes on the latters' credibility in trials before him; who levies fines which total in some years up to half of the revenue income of the village; who is not an attorney.

"As the Supreme Court said in *Tumey,* at page 532: '* * * Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.'" *Monroeville v. Ward,* 27 Ohio St. 2d 179, 194, 271 N.E.2d 757, 765-766 (1971) (Corrigan, J., dissenting).

CONCLUSION.

This Court should grant the writ of certiorari in this case to settle the question of the constitutionality of mayor's courts, thereby either rectifying the widespread deprivations of due process asserted by petitioner, or removing the cloud of illegitimacy cast upon the operation of mayor's courts by the second branch of this Court's holding in *Tumey v. Ohio, supra.*

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO.

VILLAGE OF MONROEVILLE, *Appellee*,

vs.

WARD, *Appellant*.

(No. 70-135—Decided July 14, 1971)

[Cite as Monroeville v. Ward (1971), 27 Ohio St. 2d 179.]

Constitutional law—Section 1, Article IV, Constitution—Court of Common Pleas—Appellate jurisdiction—Section 4(B), Article IV, Constitution—Mayor's court—Judicial functions of mayor not constitutionally invalid, when.

1. Pursuant to Section 1 of Article IV of the Ohio Constitution, granting the General Assembly the power to establish courts inferior to the Supreme Court, the General Assembly may provide for review by Courts of Common Pleas of judgments of courts established by statute, notwithstanding the provisions of Section 4(B) of Article IV that Courts of Common Pleas have "such powers of review of proceedings of administrative officers and agencies as may be provided by law."
2. The facts that revenues produced from a mayor's court provide a substantial portion of a municipality's funds, and that a mayor who serves as judicial officer of a mayor's court is also the chief executive officer of the municipality, do not necessarily prevent such mayor from being impartial when acting in a judicial capacity.

(No. 70-135—Decided July 14, 1971.)

APPEAL from the Court of Appeals for Huron County.

Defendant-appellant, Clarence Ward, was found guilty in the mayor's court of the village of Monroeville of failing to comply with a lawful order of a police officer,

and for refusing to produce his driver's license upon request by a police officer. Defendant was fined $50 and costs on each offense.

Defendant's convictions were affirmed by the Court of Common Pleas, and appeals in both were consolidated for hearing in the Court of Appeals.

At oral argument in the Court of Appeals that court raised the question "whether the amendment of Section 4(B) of Article IV of the Ohio Constitution, adopted on May 7, 1968 * * * deprived the General Assembly of power to confer appellate jurisdiction on the Common Pleas court to review the judgment of the mayor's court."

That question was briefed by counsel, and the Court of Appeals, holding that such an appeal is still maintainable, affirmed the judgments. (21 Ohio App. 2d 17.)

The causes are before this court pursuant to the allowance of a motion to certify the record.

Mr. Franklin D. Eckstein, village solicitor, for appellee.

Messrs. Berkman, Gordon, Kancelbaum & Schwartz and *Mr. Niki Z. Schwartz,* for appellant.

O'NEILL, *C.J.* Two questions are presented in this appeal: (1) Whether the 1968 amendment to Section 4 of Article IV of the Ohio Constitution divests the General Assembly of power to provide Courts of Common Pleas with jurisdiction to review judgments of mayors' courts, and (2) whether a mayor, who serves as chief executive officer of a municipality, can function impartially in a judicial capacity.

Prior to its amendment in 1968, Section 4 of Article IV read:

> "The jurisdiction of the Courts of Common Pleas, and of the judges thereof, shall be fixed by law."

After its amendment in 1968, Section 4 of Article IV, as it relates to jurisdiction of Courts of Common Pleas, provides:

> "(B) The Courts of Common Pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law."

At the time these causes were appealed to the Court of Common Pleas, R. C. 1905.22 provided for review of convictions in mayors' courts "* * * in the same manner as appeals on questions of law from a county court * * *" and R. C. 1921.01 provided for judgments of county courts to be appealed to Courts of Common Pleas. In addition R. C. 2953.02 provided for appeals from convictions for violation of ordinances in mayors' courts to the Court of Common Pleas.

In Amended Substitute Senate Bill No. 530, which became effective June 12, 1970, the General Assembly repealed former R. C. 1905.22 and amended R. C. 1921.01 and 2953.02, eliminating from both of those sections appeals to the Courts of Common Pleas from decisions of mayors' courts. In the same bill, the General Assembly enacted a new R. C. 1905.22, which now provides that: "Appeals from a mayor's court may be taken to the Municipal Court or county court having jurisdiction within the municipal corporation."

The initial question here is whether those former statutes providing jurisdiction for a Court of Common Pleas to hear appeals from judgments of mayors' courts, were nullified by the language of Section 4(B) of Article IV, conferring upon Courts of Common Pleas "powers of review of proceedings of administrative officers and agencies as provided by law."

There is no doubt that Section 4(B) does not confer the broad powers earlier conferred upon the General Assembly by former Section 4. In fact, the language of Section 4(B) does not confer upon the General Assembly *any* power to provide Courts of Common Pleas with jurisdiction to decide appeals from mayors' courts.

It must be noted, nonetheless, that mayors' courts still exist (R. C. 1905.01 *et seq.*), and that, at the time these causes were appealed there were statutory provisions for appeals from their judgments to Courts of Common Pleas.

Keeping this in mind, we must examine those statutes and the Constitution to see if they may be reconciled.

Our duty in such cases is expressed in paragraph one of the syllabus in *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, as follows:

> "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."

Application of this principle was discussed in *State, ex rel. Jackman, v. Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 162, wherein the court quoted with approval from *State, ex rel., v. Jones* (1894), 51 Ohio St. 492, 503, 504, as follows:

> " 'In determining whether an act of the Legislature is or is not in conflict with the Constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the General Assembly, and *whatever limitation is placed upon the exercise of that plenary grant of power must be found in clear prohibition by the Constitution.* The legislative power will generally be deemed ample to authorize the enactment of a law,

unless the legislative discretion has been qualified or restricted by the Constitution in reference to the subject matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception.' (Emphasis added.)"

We must therefore examine Article IV to ascertain if any of its provisions authorize the General Assembly to confer jurisdiction upon Courts of Common Pleas for the purpose of appellate review of judgments of mayors' courts.

Section 1 of Article IV of the Ohio Constitution provides:

> "The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, *and such other courts inferior to the Supreme Court as may from time to time be established by law.*" (Emphasis added.)

Under the above-emphasized portion of Section 1 of Article IV, the General Assembly has the authority to create mayors' courts. In *State, ex rel. Ramey, v. Davis* (1929), 119 Ohio St. 596, it was held, in paragraph four of the syllabus, that:

> "The power to create a court carries with it the power to define its jurisdiction and to provide for its maintenance."

To that proposition, we add that the authority to create courts includes also the authority to provide for appeals from judgments rendered by them.

Considering Sections 1 and 4 of Article IV together, we find that there is no "clear prohibition" in the Con-

stitution preventing the establishment by the General Assembly of provisions for the review of mayors' courts' decisions by Courts of Common Pleas. The language of Section 1 of Article IV is broad enough to support such action despite the wording of Section 4(B) of Article IV. The fact that Section 4(B) specifies that Courts of Common Pleas have "such powers of review of proceedings of administrative officers and agencies as may be provided by law" does not limit the General Assembly's power, under Section 1 of Article IV, to establish courts inferior to the Supreme Court and to make provisions for review in the Courts of Common Pleas of judgments of such statutory courts.

Therefore, we conclude that pursuant to Section 1 of Article IV of the Ohio Constitution, granting the General Assembly the power to establish courts inferior to the Supreme Court, the General Assembly may provide for review by Courts of Common Pleas of judgments of courts established by statute, notwithstanding the provisions of Section 4(B) of Article IV that Courts of Common Pleas have "such powers of review of proceedings of administrative officers and agencies as may be provided by law."

In reaching this result, we give effect to the rule that statutory provisions should not be adjudged unconstitutional unless "the legislation and constitutional provisions are *clearly incompatible.*" *State, ex rel. Dickman, v. Defenbacher, supra* (164 Ohio St. 142).

We now direct attention to the second question presented. The defendant states this issue, as follows:

> "A defendant is denied due process of law in violation of the Fourteenth Amendment to the United States Constitution when he is compelled to stand trial before a mayor whose executive responsibilities for revenue production and law enforcement prevent

him from acting as a disinterested and impartial judicial officer."

It is defendant's position that, although the decision in *Tumey v. Ohio* (1927), 273 U.S. 510, was based on the fact that a mayor, acting in a judicial capacity, could not be disinterested when his income was directly dependent upon conviction of defendants, the court therein pointed out that a mayor also might not be impartial because of his interest as chief executive officer in the finances of his municipality.

The rationale of this argument would disqualify all mayors from serving in a judicial capacity, regardless of the totality of the circumstances in regard to the amount of money provided the municipality by fines and costs levied and collected by the mayor's court.

There is provision in the Ohio statute for the filing of affidavits of prejudice against a mayor acting in a judicial capacity in a specific case where the circumstances in that municipality might warrant a finding of prejudice in that case. R. C. 2937.20.

Defendant quotes the following from *Tumey*, at page 533:

> "With his interest, as mayor, in the financial condition of the village * * * might not a defendant with reason say that he feared he could not get a fair trial * * * from one who would have so strong a motive to help his village by conviction and a heavy fine?"

Under R. C. 1905.21, a mayor's salary is fixed by legislative authority and is not dependent on fees or fines collected by the mayor's court.

Dugan v. Ohio (1928), 277 U.S. 61, held that due process was not violated in circumstances where a mayor's

salary was not dependent upon fines collected by the court.

In *Tumey,* the following language appears at page 534:

> "It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him can not be said to violate due process of law. The minor penalties usually attaching to the ordinances of a village council * * * do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact."

We are of the opinion that even though the revenue produced from a mayor's court provides a substantial portion of a municipality's funds, such fact does not mean that a mayor's impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity. The same may be said in connection with a mayor's interest in law enforcement within the municipality.

All judicial officers are properly interested in maintaining law enforcement, but such interest neither disqualifies them from serving, nor prevents them from being impartial.

The judgments of the Court of Appeals are affirmed.

Judgments affirmed.

HERBERT, STERN and LEACH, JJ., concur.
SCHNEIDER, DUNCAN and CORRIGAN, JJ., dissent.

SCHNEIDER, J., dissenting. I would concur in the first paragraph of the syllabus if I were convinced that it was the only way to preserve for review the convictions in mayors' courts occurring subsequent to our decision in *Euclid v. Heaton* (1968), 15 Ohio St. 2d 65.

But this is a problem for solution in the first instance by the General Assembly, which has the power to provide for appeals from the mayors' courts to the Courts of Appeals.

Pending action by the legislative branch, the writ of habeas corpus, jurisdiction of which is possessed by all the constitutional courts, is an adequate, if not wholly satisfactory, remedy to review the constitutionality, at least, of those convictions.

I would disregard the label, "Notice of Appeal," and consider the action before the Common Pleas Court as a plea to the exercise of that court's jurisdiction in habeas corpus.

Thus, I cannot agree wth Justice Duncan's conclusion. However, I concur with Justice Corrigan's view as expressed in his dissent, that the instant conviction is void.

CORRIGAN, *J.*, concurs in the foregoing dissenting opinion.

DUNCAN, *J.*, dissenting. With the amendment of Section 4(B) of Article IV of the Ohio Constitution, effective May 7, 1968, a significant problem is presented as regards the fate of those provisions of R. C. 1905.22, 2305.01 and 2953.02, which were effective prior to September 16, 1970, and which pre-existed the amendment and authorized an appeal to a Court of Common Pleas from a judgment or final order of a mayor's court. This question has been acute, resulting in conflicting court decisions in similar cases. See *Monroeville v. Ward* (1969), 21 Ohio App. 2d 17; *Stone v. Goolsby* (1969), 18 Ohio Misc. 105; *Village of Commercial Point v. Branson*, 20 Ohio Misc. 66; *State v. Foster* (1969), 20 Ohio Misc. 257.

It has long been the law of this state that jurisdiction is the power to hear and determine a cause. *Sheldon's*

Lessee v. Newton (1854), 3 Ohio St. 494, paragraph one of the syllabus; *Loftus v. Pennsylvania Rd. Co.* (1923), 107 Ohio St. 352, 356. Before jurisdiction exists it must be found, *inter alia,* that the law has given the tribunal subject-matter jurisdiction, or the capacity to hear the controversy in question. *Sheldon's Lessee, supra,* paragraph two of the syllabus. The limits and exercise of subject-matter jurisdiction are controlled by the Ohio Constitution and the statutes of the state. *Thompson v. Redington* (1915), 92 Ohio St. 101, paragraph one of the syllabus. See *Humphrys v. Putnam,* 172 Ohio St. 456, at 460; *State, ex rel. Finley v. Pfeiffer* (1955), 163 Ohio St. 149, 153. *Cf. Loftus v. Pennsylvania Rd. Co., supra.*

With these principles in mind, I would decide that Section 4(B) of Article IV of the Ohio Constitution does not permit a Court of Common Pleas to hear appeals from a mayor's court. Whereas the Constitution, previous to May 7, 1968, provided for the jurisdiction of Courts of Common Pleas to be fixed by law, the amendment, effective May 7, 1968, provides: "The Courts of Common Pleas shall have such original jurisdiction over all justiciable matters and such power of review of proceedings of administrative officers and agencies as may be provided by law." The subject-matter grant of power is two-fold: (1) Original jurisdiction and (2) review of proceedings of administrative officers and agencies.

In passing on the constitutionality of a statute, the basic concepts are that a statute is presumed to be constitutional, and unconstitutionality must be found beyond a reasonable doubt (*State, ex rel. Dickman v. Defenbacher* [1955], 164 Ohio St. 142, paragraph one of the syllabus), and that the Ohio Constitution is a power-limiting rather than a power-granting instrument (*McNab v. Board of Park Commrs.* [1923], 108 Ohio St. 497, 501). Equally ap-

preciated is the observation that when the electors amend the Constitution it is presumed that some change was intended. Attention to those salient touchstones of constitutional interpretation regulates the climate in which this inquiry is to be conducted.

I believe that Section 4(B) of Article IV of the Ohio Constitution, effective May 7, 1968, limits the power of the General Assembly to grant judicial review by the Common Pleas Courts to the proceedings of administrative officers and agencies. Such is, in fact, the expressed limitation. Interpreting the amendment otherwise would result in the General Assembly still having complete power to "provide for the jurisdiction of the Courts of Common Pleas," a proposition obviously abandoned by the vote of the electors.

At the same election, Section 3(B)(2) of Article IV of the Ohio Constitution was adopted, effective May 7, 1968. It reads:

> "Courts of Appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the Court of Appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies."

Although the doctrine of *expressio unius est exclusio alterius* is available in constitutional interpretation, it is not needed here inasmuch as the amendments specifically allocate judicial power to these components of the court system.

Therefore, R. C. 1905.22, 2305.01 and 2953.02, as in effect prior to September 16, 1970, were unconstitutional to the extent that they go beyond constitutional limits and

grant Courts of Common Pleas jurisdiction to hear appeals from mayors' courts.

I would hold that the Court of Common Pleas had no appellate jurisdiction to hear the appeal.

CORRIGAN, J., dissenting. Once again we are presented herein with a poser of pre-eminent significance and constitutional magnitude.

It is precisely stated in appellant's brief, Proposition of Law No. 2, as follows:

> "A defendant is denied due process of law in violation of the Fourteenth Amendment to the United States Constitution when he is compelled to stand trial before a mayor whose executive responsibilities for revenue production and law enforcement prevent him from acting as a disinterested and impartial judicial officer."

Appellant was charged by chief of police Conners of the Monroeville Police Department, first, with violating Ord. No. 47-12, Section 2 of the ordinances of that village for failing to comply with a lawful order of a police officer to stop and submit to a safety check and, secondly, with failing to produce a driver's license on the request of the police officer at the same time. Appellant was convicted and fined on each charge in the mayor's court of the village of Monroeville. Appeal was taken to the Court of Common Pleas where the judgments were affirmed and were consolidated in an appeal to the Court of Appeals for Huron County, which also affirmed the judgments.

The record shows that the appellant was flagged down at a truck check-point set up in Monroeville by an agent of the Public Utilities Commission of Ohio for the purpose of checking trucks on a state highway (Route 20) for defects, illegal loads and anything that would arise. The commission has no authority to make an arrest, but its agent, if

he finds a violation, does the checking and files an affidavit, referring the result to the policeman of the village, who makes the arrest under a village ordinance. It is the policy of the commission to encourage certain villages to pass ordinances to help the commission. Such checks are made in Monroeville, which has passed this type of ordinance.

The record establishes that a substantial portion of the general fund of the unchartered village of Monroeville was derived from fines and costs levied by the mayor in the mayor's court as follows:

Year	*Fine Revenue*	*Total General Fund Revenue*
1964	$23,589.50	$46,355.38
1965	18,508.95	46,752.60
1966	16,085.00	43,585.13
1967	20,060.65	53,931.43
1968	23,439.42	52,995.95

The record reflects further that the maintenance of this sizeable revenue from fines and costs to the village was of such importance that an ordinance was enacted hiring a management consultant firm to study the threat to its revenue posed by the 1959 County Court Law reducing the jurisdiction of mayors' courts.[1]

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[1] Ordinance No. 59-9:

"WHEREAS, the legislation known as the County Court law passed by the 102nd General Assembly greatly reduces the jurisdictional powers of Mayor Courts as of January 1, 1960; and

"WHEREAS, such restrictions may place such a hardship upon law enforcement personnel in this village and surrounding areas as to endanger the health, welfare and safety of persons residing or being in our village; and

"WHEREAS, other such provisions of this legislation may cause such a reduction in revenue to this village that an additional burden may result from increased taxation and/or curtailment of services essential to the health, welfare and safety of this village; . . .

(Continued on following page)

The executive power of villages is vested in the mayor. He is the chief conservator of the peace therein. He is also the president of the legislative authority and presides at all regular and special meetings thereof with authority to vote if there is a tie. The mayor is responsible for seeing that all ordinances of the municipality are obeyed and enforced.

He must give periodic account to the legislative authority (council) of the financial condition of the municipality. The mayor fills vacancies in any municipal department. It is his duty to supervise the conduct of all the officers of the municipal corporation, inquire into and examine the grounds of all reasonable complaints against any of such officers, and cause their violations or neglect of duty to be promptly punished or reported to the proper authority for correction.

All fines, forfeitures and costs in ordinance cases and all fees collected by the mayor are paid by him into the municipal treasury on the first Monday of each month.

In a mayor's court, established by virtue of R. C. Chapter 1905, the mayor has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, and has jurisdiction in all criminal causes involving moving traffic violations occurring on state highways located within the boundaries of the municipal corporation. The mayor, presiding at any trial, may punish for contempts, compel the attendance of

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(*Continued from preceding page*)

"BE IT ORDAINED BY THE VILLAGE OF [MONROEVILLE] OHIO:

"Section 1: That the services of the management consulting firm of Midwest Consultants, Incorporated of Sandusky, Ohio, be employed to conduct a survey and study to ascertain the extent of the effects of the County Court Law on law enforcement and loss of revenue in and to the Village of [Monroeville], Ohio, so that said Village can prepare for the future operations of the Village to safeguard the heath [sic], welfare and safety of its citizens * * *."

jurors and witnesses, and establish rules for the examination and trial of all cases brought before him, in the same manner as judges of county courts.

So the mayor in this case actually possesses executive, legislative and judicial power.

As aptly pointed out in appellant's brief:

"The scrupulous concern in American jurisprudence for the impartiality of its judges has its origins in two much venerated principles of government.

"The maxim that no man ought to be a judge in his own cause (*'Nemo debit esse judex in propria causa.'*) was rigidly applied at common law.[2] Indeed, some courts went so far as to disqualify a judge merely because he was an inhabitant of the town which would receive part of the fine should the accused be convicted. See *e.g. Pearce v. Atwood,* 13 Mass. 324 (1816).[3]

"The second principle generating concern for the avoidance of conflicts of interest on the part of the judiciary was the doctrine of separation of powers, by which the framers of the Constitution endeavored to protect individual liberty by the distribution of power among the several branches of government. Thus, Alexander Hamilton declared in No. 78 of the Federalist Papers:

" '. . . the general liberty of the people can never be endangered from [the judiciary]; I mean so long as

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[2] "The most celebrated application of this doctrine took place in *Bonham's Case* (K. B. 1610), 8 Coke 118a, 77 Eng. Rep. 646. See also *Rex v. Great Chart,* Burr. S. C. 194, Stra. 1173, where it was said, ' "And by the common law, if an order of removal were made by two justices, and one of them was an inhabitant of the parish from which the pauper was removed, such order was illegal and bad, on the ground that the justice who was an inhabitant was interested as being liable to the poor's rate." ' (Quoting from Hawkins, 2 *Pleas of the Crown*)."

[3] "Although this extreme position was rejected in Ohio, *Thomas v. Town of Mt. Vernon* (1839), 9 Ohio 290, the fact that the question posed a serious issue is indicative of the depth of commitment to the impartiality of the magistrate."

the judiciary remains truly distinct from both the legislative and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers".' [4]

"The principle of separation of powers was carried forth into the Ohio Constitution,[5] and recognized by Ohio courts as applicable to municipal corporations. Thus, in *Porter v. City of Oberlin,* 1 Ohio St. 2d 143 (1965), this court struck down a portion of the Oberlin fair housing law on the ground that it permitted a legislative commission to exercise judicial and/or executive powers. As long ago as 1928, the Hamilton County Common Pleas Court declared:

" 'Mayors, and for that matter, any other officials, have no right to have and exercise both executive and judicial powers at the same time. Such a situation violates the fundamental principle of American government, to-wit, that of the separation of the departments of government, and in the judgment of the court, a mayor having been created as an executive officer, he is to be given executive powers only, and that it is a denial of due process of law for one to be forced to trial before him involving his liberty or property.' *In re von Uehn,* 27 Ohio N. P. (N. S.) 167, 172.

"This long standing commitment of our legal system to an impartial and disinterested judiciary is violated when the judge is a mayor who has executive responsibilities for the raising and expenditure of revenue, for the enforcement of the laws, for the conservation of the peace, and for the appointment and supervision of the police force. * * *"

In this case, too, in connection with the mayor's executive responsibilities, there must necessarily be a grave

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[4] "Quoting from Montesquieu, Spirit of Laws, Vol. 1, page 181."

[5] "See Articles II, III and IV distributing the power of the state among legislative, executive and judicial branches respectively."

concern on his part for the financial condition of the village. The question then might occur to the outside observer: Is this a salutary climate for evenhanded justice where fines and costs imposed in the mayor's court represent a percentage of total revenue to the general fund of the village of over one-third to one-half during the five-year period, 1963-1968?

Then, there is also the fact that the mayor, as executive officer, appoints the chief of police and police officers of the village, and as a judge he evaluates their credibility as against opposing witnesses.

Too, the mayor, as president of the council, has a part in setting the salaries of these police officers.

Are these official interests as parts of the mayor's various capacities so minuscule, so trifling, so remote or so insignificant that his sitting as a judge in a case in the mayor's court may not contribute to a great fear on a defendant's part that he will not be fully accorded the due process of law to which he is entitled?

The city replies in the negative, and cites *Tumey v. Ohio* (1927), 273 U.S. 510, and *Dugan v. Ohio* (1928), 277 U.S. 61, in support of its position. *Tumey* differs from our factual situation in that the mayor received certain fees and costs in the amount of $12 for acting in a judicial capacity in the case. The direct pecuniary interest of the mayor in that case was held to be a denial of due process to the defendant. In *Dugan,* the charter city of Xenia had a commission form of government and the mayor was a member of the commission of five. A city manager was the executive and the mayor exercised only judicial functions. That case, too, differs from our factual situation.

It is with profound mindfulness of the unrest with laws and the enforcement of laws in our country today that I reemphasize the importance of public confidence in the

impartiality of all courts. It seems to this member of the court that this confidence, which we strive to merit in the judiciary, may be easily eroded with a mayor's court of this type. This observation is not to be considered in any way as a reflection on the integrity or capacity of the mayor who presided as judicial officer at this trial. But I am fearful that a defendant brought into a mayor's court may, with reason and persuasion, rightly complain that he was not likely to get a fair trial or a fair sentence from a judge who, as chief executive, is responsible for the financial condition of the village and who has the chief of police and other police officers under his supervision; who passes on the latters' credibility in trials before him; who levies fines which total in some years up to half of the revenue income of the village; who is not an attorney.

As the Supreme Court said in *Tumey*, at page 532:

> "* * * Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

It is equally important that there must not only be justice, but there must also be the appearance of justice, as was emphasized by this court and also by the United States Supreme Court in the following cases:

> "It is of vital importance that the litigant should believe that he will have a fair trial." *State, ex rel. Turner, v. Marshall* (1931), 123 Ohio St. 586.
>
> "* * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States,*

348 U.S. 11, 14." *In re Murchison* (1955), 349 U.S. 133, 136.

My conclusion is that these convictions should be reversed for the reason that, under the facts reflected by this record, the defendant was not given the benefit of his constitutional right to due process of law.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered July 14, 1971.)

No. 70-135.

THE STATE OF OHIO,
CITY OF COLUMBUS.

VILLAGE OF MONROEVILLE, *Appellee*,

vs.

CLARENCE WARD, *Appellant*.

APPEALS FROM THE COURT OF APPEALS FOR HURON COUNTY.

This cause, here on appeals from the Court of Appeals for Huron County, was heard in the manner prescribed by law. On consideration thereof, the judgments of the Court of Appeals are affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Mayor's Court Village of Monroeville to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Huron County for entry.

OPINION OF THE COURT OF APPEALS FOR HURON COUNTY, OHIO.

VILLAGE OF MONROEVILLE, *Appellee*,

vs.

WARD, *Appellant*.

(Nos. 805 and 806
Decided December 31, 1969)

[Cite as Monroeville v. Ward, 21 Ohio App. 2d 17.]

Court of Common Pleas—Appellate jurisdiction—to review judgment of mayor's court—Judicial functions of mayor not violation of due process, when.

1. The May 7, 1968, constitutional amendments of Article IV, when construed *in pari materia*, do not repeal by implication statutes providing for an appeal from a mayor's court to the Court of Common Pleas.
2. The union of judicial functions and executive power in a village mayor, where the mayor receives no part of the court costs, is not a violation of due process.

(Nos. 805 and 806—Decided December 31, 1969.)

APPEALS: Court of Appeals for Huron County.

Messrs. Berkman, Gordon & Kancelbaum and *Mr. Niki Z. Schwartz*, for appellant.

Mr. Franklin D. Eckstein, for appellee.

POTTER, J. These are appeals on questions of law from the Huron County Common Pleas Court wherein convictions in the mayor's court of Monroeville were sustained. Defendant, Clarence Ward, was charged with violating Sections 2 and 29, Ordinance 47-12 of the village of Monroeville, in that he failed to comply with a lawful order of a police officer and failed to produce a driver's license on request of the police officer. Defendant moved to dismiss the charges or in the alternative to certify the cases to a proper court on the ground that the mayor before whom

the cause was to be tried in Monroeville could not sit as a disinterested and impartial tribunal.

During the oral argument before this Court of Appeals, the court inquired whether the amendment of Section 4(B), Article IV of the Ohio Constitution, adopted on May 7, 1968, as part of the "Modern Courts Amendment," deprived the General Assembly of power to confer appellate jurisdiction on the Common Pleas Court to review the judgment of the mayor's court. The parties cannot confer, by consent, jurisdiction on the Common Pleas Court or this court, and an appellate court must take notice of its own want of jurisdiction. 14 Ohio Jurisprudence 2d 542, Courts, Section 127; 4 American Jurisprudence 2d 539, Appeal and Error, Section 9; 20 American Jurisprudence 2d 455, 459, Courts, Sections 95 and 99. To the court's question, scholarly supplemental briefs have been filed by counsel.

Section 4(B), Article IV, as amended, is set forth below:

> "(B) the courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law."

The section prior to amendment read as follows:

> "The jurisdiction of the Courts of Common Pleas, and of the Judges thereof shall be fixed by law."

The case of *Stone v. Goolsby* (Common Pleas, Franklin County, 1969), 18 Ohio Misc. 105, is to the effect that the amendment of Division (B) of Section 4, Article IV of the Ohio Constitution confers jurisdiction upon the Courts of Common Pleas to review proceedings of administrative officers and agencies, but the section makes no provision for the conferring of jurisdiction upon Courts of

Common Pleas to review proceedings of Municipal Courts. It held that jurisdiction to review judgments of courts of record inferior to Courts of Appeals, including Municipal Courts, is vested by the Constitution solely in the Courts of Appeals. This conclusion was reached by the application of the doctrine of *expressio unius est exclusio alterius.* That court stated that it was not unmindful of the principle that the Ohio Constitution, in general, constitutes a limitation of the power of the General Assembly rather than a delegation of power to it. However, it held that Article IV of the Ohio Constitution, as amended, specifically deals with the manner in which the judicial power of the state shall be distributed and exercised and now constitutes a limitation upon the general legislative power conferred upon the General Assembly by Section 1, Article II of the Ohio Constitution. It held that since May 7, 1968, that part of Section 1901.30(A), Revised Code, which grants an option to appeal from the Municipal Court to the Common Pleas Court is in conflict with Division (B) of Section 4, Article IV of the Ohio Constitution, and is, therefore, void. The logical extension of the reasoning in the *Stone* case, *supra,* would be to deny all appeals from Municipal Courts, police courts, County Courts and mayors' courts to the Common Pleas Courts. See Sections 1901.30, 1905.22, 1921.01, 2305.01, and 2953.02, Revised Code; and also Sections 1923.12 (Forcible Entry and Detainer) and 2933.06 (Complaint to Keep the Peace), Revised Code.

Both the plaintiff and the defendant in the *Monroeville* case came to the conclusion that *Stone v. Goolsby,* 18 Ohio Misc. 105, is not good law. The defendant lists three reasons supporting his right to appeal to the Common Pleas Court: (1) Section 4(B), Article IV, was not adopted by the electorate on May 7, 1968; (2) "Article IV, Section

4(B) of the Ohio Constitution violates appellant's rights to equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and is therefore void"; and (3) "Article IV, Section 4(B) need not be construed to deprive the General Assembly of power to confer appellate jurisdiction upon the Common Pleas Court."

The language of the condensed text of the "Modern Courts Amendment," which appeared on the ballot on May 7, 1968, is as follows:

> "Shall the Constitution of the state of Ohio be amended by amending Sections 1 and 2, enacting Sections 3, 4, 5 and 6 and repealing existing Sections 3, 4, 6, 7, 8, 10, 12 and 14 of Article IV and by repealing Sections 12 and 13 of Article II as adopted in 1851 to provide that the Supreme Court shall decide all cases by majority vote, to fix the power of the Supreme Court of Ohio to exercise administrative supervision over all courts and to make rules of practice and procedure, to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years, to equalize judges' salaries and to allow increases in compensation during term, to remove the Probate Court as a constitutional court and to authorize the consolidation of county Probate Courts and Courts of Common Pleas?"

Defendant argues in support of reason number (1) that the ballot summary failed to give the voters information as to the alleged changes affecting the right of appeal from inferior courts to the Common Pleas Courts and, therefore, cannot be said to have been adopted by the electorate. *Euclid v. Heaton* (1968), 15 Ohio St. 2d 65.

A review of the legislative history of the Act would indicate that originally all courts were to be combined in a single Common Pleas Court. Opponents of the unified

Common Pleas Court plan succeeded in eliminating this feature from the "Modern Courts Amendment." However, Section 4(B), Article IV, was not redrafted. Defendant alleges that this inadvertence was corrected, however, by the fact that the unintended consequences thereof were not presented to the voters and, hence, not adopted.

In support of the second reason defendant argues that if *Stone v. Goolsby*, 18 Ohio Misc. 105, is correct, then there is no right of appeal from the decision of the mayor's court to any court. This is the holding in *Village of Commercial Point v. Branson*, 20 Ohio Misc. 66, and *Greenhills v. Miller*, 20 Ohio App. 2d 313, both of which were reported after the submission of this case. Defendant contends that to deny a right of appeal from the mayor's court would be a violation of the equal protection clause of the Fourteenth Amendment. Parties convicted of similar offenses, *i.e.*, in a Municipal Court, could appeal, whereas there could be no appeal from such a conviction in a mayor's court. It is suggested that there is a greater need to provide for an appeal from a mayor's court than from a County or Municipal Court.

The third reason of defendant's triad is that Section 4 (B), Article IV, need not be construed to deprive the General Assembly of power to confer appellate jurisdiction upon the Common Pleas Court. Defendant contends the following: (1), the state Constitution, unlike the federal Constitution, is a limitation of power rather than a grant of power and (2) plenary legislative power is vested in the General Assembly by Section 1, Article II of the Ohio Constitution; thus, even though Section 4(B), Article IV, does not grant power to the General Assembly to vest appellate jurisdiction in the Common Pleas Court, this power may be derived from Section 1, Article II. Plaintiff joins defendant in this argument, and both counsel

stressed the remedial effect of Section 1, Article II of the Ohio Constitution. Reliance by both is placed on the recent case of *State, ex rel. Jackman, v. Court of Common Pleas of Cuyahoga County* (1967), 9 Ohio St. 2d 159. The *Jackman* case involved an application by defendants through their attorneys for a commission to take depositions of certain witnesses. The trial judge announced his intention to grant the application. Thereafter, five of the named witnesses filed an action in prohibition in the Court of Appeals seeking a writ to prohibit the trial judge from entering the above order in the journal. The Court of Appeals issued the writ, holding that amended Section 2945.50, Revised Code, which authorized the trial judge's intended action, violated Section 10, Article I of the Ohio Constitution, and also constituted an unlawful delegation of legislative powers to the trial court. The court, in 9 Ohio St. 2d 159, overruled the appeals court and made some observations which we think are pertinent to this case and are hereinafter referred to.

In reference to point number (1), the ballot summary, there is no specific requirement as to what the summary must contain so long as the condensed text properly describes the question, issue or amendment. See *State, ex rel. Foreman, v. Brown,* 10 Ohio St. 2d 139. Considering ballot space limitations, the summary was adequate and the amendment was properly presented.

To hold that there is no right of appeal from a mayor's court would require the finding that Sections 1905.22 and 1921.01, Revised Code, are repealed by implication. Such repeals are not favored, and the inconsistency must be obvious, clear and strong. 10 Ohio Jurisprudence 2d 185, Constitutional Law, Section 103. It is the duty of the court to reconcile statutes with the state and federal Constitutions, and the delicate question of unconstitutionality

should seldom be decided affirmatively in a doubtful case. *State, ex rel. Dickman, v. Defenbacher, Dir.* (1955), 164 Ohio St. 142. An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear, beyond a reasonable doubt, that the legislation and constitutional provisions are clearly incompatible. See *State, ex rel. Jackman, v. Court of Common Pleas,* 9 Ohio St. 2d 159. The Supreme Court of Ohio in that case says at page 162:

> "* * * It follows that the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions. * * *"

The court, at page 162, quotes from *State, ex rel., v. Jones, Auditor,* 51 Ohio St. 492, and reaffirmed the principle that:

> "'* * * *whatever limitation is placed upon the exercise of that plenary grant of power must be found in a clear prohibition by the Constitution.* The legislative power will generally be deemed ample to authorize enactment of a law, unless the legislative discretion has been qualified or restricted by the constitution in reference to the subject matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power.* * *'"

Discussing the doctrine of *expressio unius est exclusio alterius* the court stated that since the legislative power of the General Assembly is plenary the judiciary must proceed with much caution in applying the above maxim to invalidate legislation. It also observed that the maxim *expressio unius est exclusio alterius* is not a rule of law but rather a rule of construction. The purpose is to cut through ambiguities to lay bare the intendment of a provision. When contrary fact and circumstances are known, the rule does not apply. In the instant case it is apparent

that the facts and circumstances are known from a study of the proceedings of the Modern Courts Committee of the Ohio State Bar Association; and, further, more than one section of the Constitution is under consideration.

The appeal provisions of the mayor's court are found in that section of the Code creating the court. The constitutional fountainhead is Section 1, Article IV, which is as follows:

> "The judicial power of the state is vested in a supreme court, courts of appeal, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law."

That section was also adopted at the same time as Section 4(B), Article IV. These sections must be read *in pari materia.* The General Assembly is clearly granted the power to create courts inferior to the Supreme Court. There is no limitation here on the General Assembly. The power to create a court carries with it the power to determine its jurisdiction and provide for its maintenance. *State, ex rel. Ramey, v. Davis,* 119 Ohio St. 596. This section is as broad as was the old Section 4, Article IV, and may be augmented by acts of the General Assembly. See *Stevens v. State,* 3 Ohio St. 453, at page 455, in reference to the former Section 4, as follows:

> "The constitution itself confers no jurisdiction whatever upon the court either in civil or criminal cases. It is given a capacity to receive jurisdiction in all such cases, but it can exercise none until 'fixed by law.' "

Under Section 1, Article IV, the General Assembly may provide for the review of proceedings of inferior courts, which it has the power to create, unless there is a "clear prohibition by the Constitution." See the *Jackman*

case, *supra*, page 162 (of 9 Ohio St. 2d), and *State, ex rel., v. Jones, Auditor,* 51 Ohio St. 492.

In *Price v. McCoy Sales & Service, Inc.*, 2 Ohio St. 2d 131, overruling *Green v. Acacia Mutual Life Ins. Co.*, 156 Ohio St. 1, the words of Judge Taft, now Chief Justice, in *Gray v. Youngstown Municipal Ry. Co.*, 160 Ohio St. 511, at page 520, were reiterated. They are:

> "Appellate procedure is a branch of the law where *simplicity, clarity* and *consistency* are especially important."

We also note the admonition of Chief Justice Weygandt in *Youngstown Municipal Ry. Co. v. Youngstown*, 147 Ohio St. 221, at page 223, as follows:

> "To so construe the amendment would imply an intention on the part of its proponents to precipitate chaos in the appellate courts of this state at a time when there could be no relief therefrom unless the General Assembly might see fit to take action. There would be no possibility of taking a case from the trial court to either the Court of Appeals or this court. It seems highly improbable that so fantastic a result was intended; and a careful study of the amendment in its entirety, as there must be, so discloses.* * *"

We hold that there is no clear prohibition of the historical review by the Common Pleas Court of proceedings of a mayor's court, nor are the constitutional provisions, construed *in pari materia,* clearly incompatible with the statutes so providing.

To hold that there is no such right of appeal would necessitate the finding that since the mayor's court is not a court of record there would be no right of any appeal from that court. While an appeal is not a constitutional right, yet parties equally situated would be denied the equal protection of the law. A party accused of a similar

violation and tried in a County Court or Municipal Court could appeal to an appellate court, but a defendant in a mayor's court would have no appeal except perhaps an illusory one to the Supreme Court of the United States. *Thompson v. Louisville,* 362 U. S. 199. The argument that the Fourteenth Amendment invalidates Section 4(B), Article IV, as now set forth and reinstates the previous section would then have validity. See *State v. Howell* (1965), 4 Ohio St. 2d 11; *Griffin v. California,* 380 U. S. 609; 16 American Jurisprudence 2d 266, Section 54; and 16 Corpus Juris Secundum 185, Constitutional Law, Section 68, to the effect that a state constitutional amendment which conflicts with a federal constitutional guaranty is invalid. Construing all the sections of the Ohio Constitution, as adopted May 7, 1968, and giving each vitality, we avoid this finding. Finding that there is a right of appeal from the Mayor's Court of Monroeville to the Huron County Common Pleas Court, we now consider the assignment of error as set forth in the brief of appellant, defendant below.

Defendant alleges error in that he was compelled to stand trial before a mayor who, by reason of his executive position and responsibilities, could not be a disinterested and impartial judicial officer.

Defendant relies primarily on the cases of *Tumey v. Ohio,* 273 U. S. 510, and *Dugan v. Ohio,* 277 U. S. 61. The *Tumey* case involved a unique method of enforcing the prohibition act. The mayor's court and others were given county-wide jurisdiction. Money arising from fines and forfeited bonds was paid one-half into the state treasury and one-half to the township, municipality or county treasury wherein the prosecution was held. The village of North College Hill then provided for a percentage of the funds received to be distributed to deputy marshals of the

villages, prosecuting attorneys, and detective and secret service officers. The mayor, in addition to his regular salary, received the amount of the costs in each case. This, of course, depended on a conviction. The Supreme Court found that this procedure violated the Fourteenth Amendment.

Defendant argues that, although in the instant case the mayor does not receive the costs, his concern for the financial condition of his village which received the fines is inconsistent with judicial impartiality. The *Dugan* case held that the Fourteenth Amendment was not violated where the mayor did not receive the costs and his salary was the same whether the trial before him resulted in conviction or acquittal. His relation to the fund and the financial policy of the city was too remote to warrant a presumption of bias toward conviction.

Defendant endeavors to distinguish that case on the ground that the mayor in the *Dugan* case did not exercise executive power under the applicable commission form of government. Before applying the above cases, it is appropriate to point out that subsequent statutory amendments have placed severe limitations on the mayor's court. See Section 1905.01, Revised Code:

> "* * * the mayor of such municipal corporation has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, and has jurisdiction in all criminal causes involving moving traffic violations occurring on state highways located within the boundaries of the municipal corporation, subject to the limitations of Sections 2937.08 and 2938.04 of the Revised Code."

See, also, Section 1907.031, Revised Code. This, we think, brings the case within the statement of the court in *Tumey, supra,* at page 534, which we quote below:

"* * * It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him can not be said to violate due process of law. The minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact. The difference between such a case and the plan and operation of the statutes before us is so plain as not to call for further elaboration."

Although in the instant case the revenue from the mayor's court was sizable, nevertheless, we think there was no violation of due process. If all mayors' courts are to be abolished, that is a decision for the General Assembly and not this court.

The assignment of error in this respect is not well taken.

Further, we find the branch of the assignment of error asserting that the mayor's executive responsibility impaired his judicial impartiality to pass upon the credibility of police witnesses is also not well taken.

The judgments of the Common Pleas Court of Huron County are affirmed and the causes are remanded to the Mayor's Court of Monroeville for execution of sentence.

Judgments affirmed.

BROWN, P.J., and STRAUB, J. concur.

§ 733.23 Executive Power in Villages.

The executive power of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law.

§ 733.24 Mayor of Village; Election; Term; Qualifications; Powers; Duties.

The mayor of a village shall be elected for a term of four years, commencing on the first day of January next after his election. He shall be an elector of the village. Such mayor shall be the chief conservator of the peace therein and shall have the powers and duties provided by law. He shall be the president of the legislative authority and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.

§ 733.30 General Duties of the Mayor of a Municipal Corporation.

The mayor shall perform all the duties prescribed by the bylaws and ordinances of the municipal corporation. He shall see that all ordinances, bylaws, and resolutions of the legislative authority are faithfully obeyed and enforced. He shall sign all commissions, licenses and permits granted by such legislative authority, or authorized by Title VII of the Revised Code, and such other instruments as by law or ordinances require his certificate.

§ 733.32 Communications to Legislative Authority of Finances and General Conditions.

The mayor shall communicate to the legislative authority from time to time a statement of the finances of the municipal corporation, and such other information relating thereto and to the general condition of the affairs of such municipal corporation as he deems proper or as is required by the legislative authority.

§ 733.33 Protest Against Excess of Expenditures.

If, in the opinion of the mayor, an expenditure, authorized by the legislative authority, exceeds the revenues of the municipal corporation for the current year, he shall protest against such expenditure, and enter such protest, and the reason therefor, on the journal of the legislative authority.

§ 733.40 Disposition of Fines and Other Moneys.

All fines, forfeitures, and costs in ordinance cases and all fees collected by the mayor, or which in any manner come into his hands, or which are due such mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses which have been advanced out of the treasury of the municipal corporation, and all money received by such mayor for the use of such municipal corporation, shall be paid by him into such treasury on the first Monday of each month. At the first regular meeting of the legislative authority each month, the mayor shall submit a full statement of all money received, from whom and for what purposes received, and when paid into the treasury. Except as otherwise provided by sections 3375.50 to 3375.52, inclusive, of the Revised Code, all fines, and forfeitures collected by the mayor in state cases, together with all fees and expenses collected which have been advanced out of the county treasury, shall be paid by him to the county treasury on the first business day of each month. All court costs and fees collected by the mayor in state cases shall be paid by him into the municipal treasury on the first business day of each month.

§ 737.15 Appointment of Village Marshal.

Each village shall have a marshal, designated chief of police, appointed by the mayor . . .

§ 737.18 General Powers of Village Police Officers.

The marshall [sic] shall be the peace officer of a village and the executive head, under the mayor, of the police force . . .

§ 1905.01 Jurisdiction in Ordinance Cases and Traffic Violations.

In all municipal corporations not having a police court and not being the site of a municipal court nor a place where Portage county municipal court sits as required pursuant to section 1901.021 [1901.02.1] of the Revised Code or by designation of the judges pursuant to section 1901.021 [1901.02.1] of the Revised Code, the mayor of such municipal corporation has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, and has jurisdiction in all criminal causes involving moving traffic violations occurring on state highways located within the boundaries of the municipal corporation, subject to the limitations of sections 2937.08 and 2938.04 of the Revised Code.

In keeping his docket and files, the mayor shall be governed by the laws pertaining to county courts.

§ 1905.20 Powers of Mayors in Criminal Matters.

The mayor of a municipal corporation has, within the corporate limits, all the powers conferred upon sheriffs to suppress disorder and keep the peace. The mayor shall award and issue all writs and process that are necessary to enforce the administration of justice throughout the municipal corporation. The mayor shall subscribe his name and affix his official seal to all writs, process, transcripts, and other official papers. In cities having no police judge, in the absence or during the disability of the mayor, he may designate a judge of the county court to perform his duties in criminal matters. Such judge, during such absence or disability, has the same power and authority as the mayor. A mayor shall be disqualified in any criminal case in which he was the arresting officer, assisted in the arrest, or was present at the time of arrest, and shall not hear the case.